No. 99-651

IN THE

Supreme Court of the United States

KIM D. FIORIGLIO,

Petitioner,

v.

CITY OF ATLANTIC CITY, JAMES WHELAN, PAUL GALLAGHER, BENJAMIN BRENNER, TERRENCE MOONEY, DENNIS BROOKS, ATLANTIC CITY FIREFIGHTERS LOCAL 198, JOSEPH RUSH, JOHN DOE(S) 1-50, fictitious names(s) as individuals, and ABC CORPORATION(S) 1-50, fictitious names(s) as corporations and/or entities, i/j/s/a,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT BENJAMIN BRENNER

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PARTIES TO THE PROCEEDING

The parties to the proceeding are Kim D. Fioriglio, as Petitioner, and the City of Atlantic City, James Whelan, Paul Gallagher and Benjamin Brenner as Respondents.

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OPINIONS BELOW

In addition to the opinions cited by Petitioner[1], the United States District Court for the District of New Jersey also denied Petitioner's Motion for Relief from Judgment under Rule 60(b) to open up the Judgment and include additional certifications by opinion dated April 8, 1998. The April 8, 1998 opinion is set forth in Appendix R1a.

STATEMENT OF THE CASE

Petitioner took a written examination on September 22, 1990, given by the New Jersey Department of Personnel ("DOP") for the position of Battalion Fire Chief for the City of Atlantic City, and an oral examination on November 21, 1991.

On November 20, 1992, after the tests had been rescored, the DOP posted results of the Battalion Chief test which indicated that Petitioner was in a four way tie. In 1993, one candidate was promoted to Battalion Chief due to veteran's preference, which left Petitioner in a three way tie for first for Battalion Chief with Terrence Mooney ("Mooney") and Daniel Tamburilla ("Tamburilla").

On February 1, 1994, Petitioner decided to run for Mayor of Atlantic City against Respondent, James Whelan ("Whelan or Mayor"). During the campaign, Petitioner alleges that he revealed a number of improprieties and irregularities associated with Mayor Whelan's administration. On May

1. The opinion of the Third Circuit dated June 8, 1999 and reported at 185 F.3d 861 and the opinions of the District Court of New Jersey dated March 5, 1998 and May 7, 1997 and reported at 966 F. Supp. and 963 F. Supp. 415, respectively.

12, 1994, Mayor Whelan was elected to his second term. Petitioner was a minor candidate for Mayor who handed out one campaign flyer. Mayor Whelan received over 5,000 votes. Petitioner received under 200 votes.

In October 1994, the DOP issued new guidelines for the Disposition of a Certification. N.J.A.C. 4A:4-4.8. The new guidelines required officials with appointment authority to provide a statement of the reasons why an appointee would be selected over another appointee in the case of a tied score. In response to the new guidelines and at the urging of Respondent Benjamin Brenner, the Chief of the Fire Department ("Brenner"), Mayor Whelan enacted Executive Order #3 of 1994. The Executive Order provided that the appointing authority should consider six criteria in breaking ties, which were disciplinary history, education, sick leave abuse, diversity, residency, and raw score. Previously, ties were broken alphabetically.

In December 1994, based on Executive Order #3 of 1994 and his own evaluation of the three tied candidates, Brenner recommended to Whelan that Mooney and Tamburilla be selected as Battalion Chiefs.

SUMMARY OF ARGUMENT

Petitioner fails to point to any evidence of any conspiracy against him because he ran for mayor and received under 200 votes. All Petitioner has shown or can show is: (1) that he ran for mayor; (2) subsequently the City changed its tie-breaking policy from alphabetical and/or residency to one requiring consideration of six factors: education, disciplinary history, raw scores, residency, and diversity; and (3) Petitioner was not promoted to Battalion Chief.

Petitioner's entire case is based on those undisputed facts. There is absolutely no direct or indirect evidence that the failure to promote him was in even the slightest way related to his political campaign.

Petitioner offered no direct evidence to establish that his failure to receive the promotion was retaliatory. Petitioner's circumstantial proof was also woefully inadequate. Petitioner alleges that Whelan, Brenner and Paul Gallagher ("Gallagher"), the city solicitor, all conspired to deprive him of his rights because he ran for mayor and received 186 votes. He alleged that this conspiracy was hatched at a meeting among the conspirators, but Petitioner himself testified under oath that he has no knowledge that such a meeting ever took place or what was discussed at such meeting.

The "smoking gun" for this conspiracy is that Gallagher, in response to a regulatory mandate from the DOP, drafted an executive order scrapping the old policy of breaking ties among possible civil service promotees alphabetically and substituting the consideration of the six criteria. Once again, Petitioner offered no evidence to establish that this action, which was mandated by DOP, was retaliatory.

As detailed below, there is no reason for this Court to review this case which has now been rejected by the District Court twice and also by the Third Circuit. The Third Circuit also rejected a request for a hearing *en banc*. Petitioner has distorted the facts of this case and the law to be applied in this case. There is no conflict among the circuits and the standards for political retaliation have been established for over 20 years.

A. Petitioner misrepresents and distorts the facts of the case before the District Court.

Petitioner misrepresents or omits essential facts in this case. First, Petitioner argues that in order to establish a *prima facie* case of discriminatory treatment under the McDonnell Douglas framework under Section VII of the Civil Rights Act of 1964 "that the Plaintiff must prove: (i) he/she belongs to a racial minority . . .". Petitioner then states that he was a **minority** because he was **"in the minority of [those] not supporting the Mayor for reelection."**[2] Pet. 5-6. Petitioner is not a minority and fails to cite any case law to support his statement that those who do not support the incumbent mayor are considered a "minority" for Title VII purposes.

Second, Petitioner states that "the Petitioner demonstrated the continuous comments the city officials made against him . . ." Pet. 5. Not only did Petitioner fail to demonstrate continuous comments, Petitioner failed to establish any comment in the record that city officials made against him. The only comments that were made against him cited by Petitioner were unsigned, unsworn statements which were inadmissible and contained hearsay. These statements were not considered by the District Court for failure to comply with court rules.

Third, Petitioner states that the "Mayor changed the hiring process just so that he did not have to promote the

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2. This argument is frivolous. Supreme Court Rule 42.2 provides that "when a petition for a writ of certiorari . . . is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel."

Petitioner." Pet. 6. This is incorrect and distorted. The Mayor did not change the hiring process. The Mayor changed the tie-breaking process in response to a mandate from the DOP requiring the appointing authority to specify reasons as to why when two candidates are tied, the appointing authority selects one candidate over another. In response to that state mandate, the Mayor changed the tie-breaking policy from alphabetical to a tie-breaking process based upon six criteria. Nowhere in Petitioner's brief does he mention the state mandate to issue new guidelines for the tie-breaking policies.

Fourth, Petitioner states that the "mayor . . . in fact, hired two other people who did not score as high as the Petitioner." Pet. 6. Petitioner fails to mention that he was not alone in first place. Petitioner was in a three way tie for the first with two other candidates. The Mayor followed the recommendation of Brenner to select two candidates who were tied for first with the petitioner. The other two candidates were selected because they better qualified.

B. Petitioner misstates that he submitted sufficient evidence to show the nexus between his protected speech and his failure to receive the promotion to Battalion Chief.

The Trial Court was correct in holding that Petitioner failed to set forth any facts or communication which shows any connection between his run for mayor and a § 1983 conspiracy to deny him a promotion. Petitioner cannot maintain a claim of civil conspiracy against Respondents based upon his unsubstantiated theory that Respondents conspired to bypass him from promotion to Battalion Chief because he ran for mayor against Whelan.

A section 1983 conspiracy claim is a conspiracy to violate a right protected by section 1983; in other words, a conspiracy to deprive a plaintiff of a constitutional or federally protected right under color of state law. *Dixon v. City of Lawton, Okla.*, 898 F.2d 1443, 1449 n.6 (10th Cir. 1990). *Daniels v. Williams*, 474 U.S. 327, 330-32 (1986). To prove a conspiracy a violation of section 1983, a plaintiff "must show that the parties reached an understanding to deny the plaintiff his or her rights [and] prove an actionable wrong to support the conspiracy." *Bendiburg v. Dempsey*, 909 F.2d 463, 468 (11th Cir. 1990), *cert. denied*, 500 U.S. 932 (1991). "The linchpin for conspiracy is agreement, which presupposes communication. . . ." *Bailey v. Board of County Commrs of Alachua County*, 956 F.2d 1112, 1122 (11th Cir. 1992).

The plaintiff must make specific factual allegations of a combination, agreement or understanding among all or between any of the defendants to plot, plan or conspire to carry out the alleged chain of events in order to deprive plaintiff of a federally protected right. *See Darr v. Wolfe*, 767 F.2d 79, 80 (3d Cir. 1985); *Ammlung v. City of Chester*, 494 F.2d 811, 814 (3d Cir. 1974). Inferences based on speculation and conjecture are insufficient to create a factual dispute and defeat a summary judgment motion. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 383 n.12 (3d Cir. 1990); *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir. 1985).

Petitioner alleges that the Respondents conspired to deprive him of a promotion by changing the factors by which ties are broken from alphabetical to six different criteria. The six criteria are disciplinary history, education, sick leave abuse, diversity, residency and raw score. Petitioner

speculates that the reason for the change in factors used to break ties was not in response to a newly enacted personnel regulation N.J.A.C. 4A:4-4.8, which requires that the appointing authorities state the reasons for their appointment choices in the case of a tied score, but rather because he ran as a candidate against Whelan in May 1994. However, all Petitioner has is speculation and conjecture built upon inferences. When asked what he bases his speculation upon, Petitioner admitted that its all assumptions and speculation. He admitted he had absolutely no facts to support his assumptions. Petitioner also admitted that the newly adopted tie-breaking criteria are appropriate considerations in deciding who to promote.

Petitioner's theory is that the Respondents conspired against him: (i) during a meeting that he has absolutely no knowledge, proof or evidence even took place or what, if anything was discussed; (ii) that they adopted rational promotional criteria that in no way discriminates against him or is biased against him; (iii) that Brenner did not promote him in order to retaliate for a Mayor with whom Brenner had absolutely no political connection. Petitioner has no proof, no evidence, no piece of paper, no facial gesture, no words, and no conduct to support his theory . . . he has only his theory.

Petitioner has not established any nexus between his run for mayor and failure to be promoted. Just because Petitioner was not promoted and ran for mayor, does not establish a causal link between the two. It is Petitioner's burden to establish some connection between the two events. The reason he was not promoted was simply because he was not the best candidate. He did not measure up to the rest of the candidates based on the six criteria, a fact that Petitioner

freely admitted. His non-appointment had nothing to do with the fact that he ran for mayor and received less than 200 votes. To suggest otherwise is to make every third-party mayoral candidate who is also a city employee immune to subsequent adverse personnel decisions.

C. The burden of proof in First Amendment Retaliation cases is well established and was correctly applied in this case.

Petitioner argues that this case is worthy for review because the Trial Court applied a different standard than that enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This Court in *McDonnell Douglas* established the standard for establishing a *prima facie* case of discriminatory treatment based upon circumstantial evidence for cases under Title VII. The Trial Court applied the proper standard in dismissing Petitioner's claim for retaliation in violation of his rights under the First and Fourteenth Amendments. The Trial Court analyzed plaintiff's proofs to determine whether Petitioner was able to show:

1. that he engaged in protected activity, i.e. protected speech; and

2. that the protected speech was a substantial or motivating factor in the alleged retaliatory action.

See Petitioner's Appendix pg. 11a-12a.

Once a plaintiff meets this burden, the defendant may defeat the plaintiff's claim by demonstrating by a preponderance of the evidence that the same action would have been taken even in absence of the protected conduct.

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). The Trial Court never reached this issue because Petitioner produced absolutely no evidence that his protected activity was a substantial or motivating factor in the alleged retaliatory action.

According to Petitioner, "lower courts are unsure how to weigh evidence of political discrimination cases" because the *McDonnell Douglas* test is not applied to political discrimination cases. Pet. 8. Petitioner cites no authority to show that this problem exists, but then jumps to the conclusion that "[t]he role of this Court is to establish a uniformity as to the burden of proofs and persuasion in a political discrimination cases."[3] *Id.*

Despite Petitioner's conclusory assertions to the contrary, there is no uncertainty among lower courts regarding the standard to be applied in political retaliation cases. This Court established the proper standard more than twenty years ago in the *Mt. Healthy* decision. That standard was properly applied by the Trial Court and Respondents' Motion for Summary Judgment was properly granted.

As stated previously, Petitioner's claim was dismissed because he produced absolutely no evidence of any casual connection between Petitioner's failed mayoral campaign and his failure to receive the promotion to Battalion Chief. Petitioner did not produce a scintilla of evidence below that the denial of promotion was retaliatory. Petitioner's claim

3. It should be noted that the cases cited by Petitioner are cases where political discrimination based upon political affiliation was at issue. Petitioner's claim and the standard used by the Trial Court is for retaliation based upon specific political speech, not party affiliation, a slightly different standard.

would fail under any standard of proof because he cannot establish any link between his protected activity and the alleged retaliatory action. The Trial Court properly applied the correct standard, the standard enunciated by this Court more than two decades ago, and dismissed Petitioner's claim.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED APRIL 8, 1998 AND FILED APRIL 9, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HONORABLE JOSEPH E. IRENAS

CIVIL ACTION NO. 96-2295 (JEI)

KIM D. FIORIGLIO,

Plaintiff,

v.

CITY OF ATLANTIC CITY, JAMES WHELAN, PAUL GALLAGHER, BENJAMIN BRENNER, and JOSEPH RUSH,

Defendants.

OPINION

* * *

IRENAS, District Judge:

Presently before the Court is the motion of plaintiff, Kim Fioriglio ("Fioriglio"), asking for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Because we do not find that the attorney error which occurred in this matter constitutes mistake, inadvertence or excusable neglect sufficient under Rule 60(b) to grant plaintiff relief, *see* Fed. R. Civ. P. 60(b), we will deny plaintiff's motion.

Appendix

I. BACKGROUND

On March 5, 1998, we granted summary judgment to all defendants on all remaining counts in this action and dismissed plaintiff's complaint in its entirety. The underlying facts of this case can be found in that opinion. *See Fioriglio v. City of Atlantic City*, __ F. Supp. __, 1988 WL 111323 (D.N.J. March 5, 1998). In reaching our decision as to summary judgment, we refused to consider three unsworn, unsigned statements submitted by plaintiff in support of his opposition to summary judgment. We stated:

> [F]or a statement to be admissible, it must be made under oath and on personal knowledge, it must set forth facts which would be admissible in evidence, and it must show that the affiant is competent to testify to the matters stated therein. Plaintiff asks us to consider transcripts of statements allegedly made by fellow firemen and tape recorded by plaintiff for purposes of this litigation. Plaintiff submits these taped statements as proof of comments allegedly made by Whelan which might show the Mayor's retaliatory motives in not promoting plaintiff. In one comment, allegedly made to another fire captain, the Mayor supposedly said "you firemen always want something and you go and support that asshole Fioriglio for Mayor against me and then you think I am going to give an appointment." The other two declarants supposedly overheard the Mayor say: "F--ck you, F--ck you, you fireman and f--ck that Fioriglio, he will never be Mayor" and "Kim

> would never be promoted as long as [I am] Mayor." However, none of the statements are sworn to or signed by the alleged speakers. They were not given under oath and neither plaintiff nor his attorney has submitted an affidavit attesting to the transcripts' validity. Thus, these statements fail to meet the requirements of Fed.R.Civ.P. 56(e), and we will not consider them for purposes of summary judgment.

Id. at *4.

Plaintiff now seeks, through the relief afforded by Rule 60(b) of the Federal Rules of Civil Procedure, to introduce the certifications of two of the firemen attesting to the accuracy of the taped statements originally submitted unsworn and unsigned. The first is the certification of Wayne Gotwalls, undated, attesting to the written statement he gave to plaintiff's attorney on December 2, 1996, and the second is the certification of James Boyer, dated March 11, 1998, attesting to the written statement he gave to plaintiff on September 4, 1996. No certification was submitted as to the statement of the third fireman, Scott McKnight, allegedly given to plaintiff's attorney on May 28, 1996.

The facts surrounding plaintiff's attorney's failure in his opposition papers to submit the certifications for the three statements or otherwise have them sworn are as follows. By order of Magistrate Judge Rosen, all dispositive motions in this case were to be filed no later than December 1, 1997. However, as the result of the unfortunate death of one of the family members of the defense, discovery and dispositive

motion deadlines were extended beyond that date. On January 6, 1998, having received the summary judgment motion papers of the defendants, plaintiff's attorney sent out copies of plaintiff's papers in opposition to defendants' motions for summary judgment. These papers were sent out in somewhat of a hurried fashion as plaintiff's attorney believed he had more time to respond but was receiving complaints from his adversaries. These papers contained the three unsworn, unsigned statements.

Shortly after he sent out plaintiff's response, plaintiff's attorney received a copy of the reply brief of defendant Brenner, in which Brenner's attorney objected to the use of the unsworn statements and asked the Court not to consider them. Although plaintiff's attorney focuses solely on the Brenner brief, it appears he may have been put on notice of the defendants' objections to the statements earlier. Under cover letter dated December 4, 1997, defendant Gallagher objected to the use of the statements as hearsay in his proposed pre-trial order. Also dated December 4, 1997, defendant Atlantic City provided plaintiff's attorney with a proposed pre-trial order objecting to the use of the statements because they were obtained in violation of The Rules of Professional Conduct. Finally, under cover letter dated January 9, 1998, plaintiff's attorney received a proposed pre-trial order of defendant Whelan which objected to the use of the three statements as "hearsay."

Plaintiff's attorney alleges that, in response to Brenner's brief, he wrote a memorandum to his former secretary/ paralegal indicating that they needed to have the unsworn statements attached to the summary judgment motion sworn.

Appendix

The memo is addressed to "Sue" from "Dan" (plaintiff's attorney) and is undated. It states:

> Make sure that you attach Page 7 of the Gotwalls Deposition and Page 10 of the Boyer Deposition and send the same under cover letter to the Court indicating that we have certified the statements. Before you do this, double check the file to see if Kevin Moses [the lawyer who recorded two of the statements] had done an attestation clause or some type of certification clause to the statements he took. I told him to do this, I don't know why they were not attached. Also, have Kim go out and give Certification pages to Boyer, Gotwalls and McKnight. I do not see where we have a Deposition of McKnight so this will probably be the most important one to get certified.
>
> Do this immediately. It is a little bit embarrassing to have Donnelly [Brenner's attorney] point this out in his Brief that we have omitted to do this.

Exh. 3 to Perskie Certif. Plaintiff's attorney assumed that his former secretary/paralegal obliged with his request and cured the deficiency by getting certifications. Shortly after he gave her the memo, however, she quit his employ and went back to North Jersey to work with her old law firm. No certifications or pages from the Gotwalls and Boyer depositions were submitted to this Court prior to the date upon which we granted summary judgment. We did not receive the two certifications and deposition pages until March 19, 1998, at which time the instant Rule 60(b) motion was received in Chambers.

Plaintiff's attorney has assumed full responsibility for the oversight in not getting attestations to the three unsworn statements. After receiving our opinion of March 5, 1998, he asked Fioriglio to get certifications from each of the three firemen, in particular from McKnight, who did not testify at a deposition. With his motion for Rule 60(b) relief, he submitted Page 7 of Gotwalls' deposition and Page 10 of Boyer's deposition, where each deponent, under oath, attested to the accuracy of the statements in question. Signed certification by these men were also submitted. In Gotwalls' certification, Gotwalls attested to statement he allegedly gave on December 2, 1996. However, in his deposition, he testified about giving a statement in August 1996.

Nothing has been submitted by McKnight. Plaintiff's attorney claims that he asked Fioriglio to go to McKnight and have him attest to his statement. However, because of a personal problem between Fioriglio and McKnight, McKnight has refused on two occasions to sign a certification.

II. DISCUSSION

Rule 60(b) of the Federal Rules of Civil Procedure contains six numbered clauses that list grounds on which a court may relieve a party from an otherwise final judgment. These grounds are:

> 1. Mistake, inadvertence, surprise, or excusable neglect.

2. Newly discovered evidence that a party, even exercising due diligence, could not have discovered in time to move for a new trial.

3. Fraud . . . , misrepresentation, or other misconduct of an adverse party.

4. Voidness of the judgment.

5. Satisfaction, release, or discharge of the judgment, or when a prior judgment that is the basis for the current judgment is reversed or otherwise vacated, or it is no longer equitable that the judgment continue to have prospective application.

6. Any other reason that justifies relief from the judgment.

Fed. R. Civ. P. 60(b)(1)-(6).

Here, plaintiff's attorney is seeking relief under the first ground: mistake, inadvertence, surprise or excusable neglect. Fed. R. Civ. P. 60(b)(1). It is well-established that Rule 60(b) relief is an extraordinary remedy and is granted only in extraordinary circumstances. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988); *Moolenaar v. Gov't of Virgin Islands*, 822 F.2d 1342, 1346 (3d Cir. 1987); *Marshall v. Board of Educ.*, 575 F.2d 417, 425 (3d Cir. 1978); *Martinez-McBean v. Government of the Virgin Islands*, 562 F.2d 908, 911 (3d Cir. 1977); *Stradley v. Cortez*, 518 F.2d 488, 493 (3d Cir. 1975). The decision as to whether relief

should be granted under Rule 60(b) is committed to the sound discretion of the court. *See Laskey v. Continental Prods. Corp.*, 804 F.2d 250, 256 (3d Cir. 1986); 12 Moore's Federal Practice ¶ 60.22[1]. The discretion is not an arbitrary one, but a sound legal discretion guided by accepted legal principles. *Id.*

Plaintiff's attorney bases his motion for relief under Rule 60(b) on his "mistake, inadvertence or excusable neglect" in submitting the three unsworn, unsigned statements to this Court in support of his opposition to the defendants' motions for summary judgment. He argues that he failed to include certifications by the firemen making the statements in his opposition papers because he believed his paralegal had addressed these deficiencies. This, he claims, is sufficient excusable neglect or inadvertence to justify relief under Rule 60(b).

Excusable neglect involves circumstances that are unique or extraordinary. *U.S. v. Fraya, S.E.*, 170 F.R.D. 346, 348 (D. P.R. 1997). Ignorance or carelessness of an attorney generally does not constitute excusable neglect under Rule 60(b). *Robinson v. Armontrout*, 8 F.3d 6, 7 (8th Cir. 1993). For example, courts have held that simple carelessness in failing to read motions or other legal papers is not excusable neglect. *See, e.g., Kunik v. Racine County*, 106 F.3d 168, 171, 173-74 (7th Cir. 1997) (counsel's signing summary judgment brief without reading it and without reviewing the record to find supporting evidence is not the kind of excusable neglect contemplated by Rule 60(b)); *In re Four Seasons Securities Litigation*, 502 F.2d 834, 839, 842 & n.6 (10th Cir. 1974 (failure to read court's order is "neglect . . .

deemed, properly we think, inexcusable under Rule 60(b)(1)").

Other courts have concluded that the types of attorney error which occurred here do not constitute mistake, inadvertence or excusable neglect. In *Hall v. Daka Intern, Inc.*, 172 F.R.D. 19 (N.D.N.Y. 1997), the court held that an attorney's failure to obtain, prior to judgment, an affidavit purportedly supporting the employee's age discrimination claim, did not constitute mistake, inadvertence, or excusable neglect that would entitle the employee to relief from judgment, where the employee was aware, well before judgment, of the existence of the affiant and that the affiant might offer probative evidence on the age discrimination claim.

In *Fraya, S.E.*, 170 F.R.D. at 349, the court addressed the issue of whether an attorney's mistaken belief of actions supposed to have been taken by his secretary constituted excusable neglect. The court held that an attorney's mistaken belief that his secretary had timely filed a motion for enlargement of time to respond to a motion for summary judgment did not constitute excusable neglect and did not justify granting relief under Rule 60(b).

Under the facts of this case, it would not be appropriate for the court to relieve the plaintiff from the general rule that litigants are bound by the acts of their attorneys. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 (1962). First, it appears that plaintiff's attorney may have been on notice as to the deficiency of the three statements as much as a month before he filed plaintiff's brief in opposition to

the summary judgment motions. The pretrial orders of both Gallagher and Atlantic City, dated December 4, 1997, objected to the use of the statements because they were hearsay and because they violated the Rules of Professional Conduct.[1] Second, even if he was not alerted to the fact that the statements were unsworn, and therefore not proper for consideration, until after reading Brenner's brief, he still had adequate time to ensure the defects were corrected. The return date for the motion was February 20, 1998. Even beyond that date, plaintiff's attorney could have requested the Court to hold off on rendering its decision until he was able to obtain the statements.

Finally, the deficiencies have still not been entirely corrected. The Court must continue to disregard the statement of McKnight as it remains unsworn and unsigned. McKnight's refusal to attest to any alleged statement he may previously have given raises further suspicion as to the validity and credibility of the statement itself. In addition, the undated certification and deposition testimony given by Gotwalls are inconsistent. In the certification, Gotwalls claims he gave the statement on December 2, 1996. In his deposition testimony, he stated that the statement was given in August 1996. The transcript of the statement notes the date as August 2, 1996. Thus, the Court is reluctant to consider the Gotwalls statement as competent evidence.

We do not believe that Rule 60(b) relief is warranted here. Plaintiff's attorney's error did not constitute the type of mistake, inadvertence, or excusable neglect sufficient to

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1. We need not reach, and thus are not making any judgment on, the ethical issues that maybe implicated under the Rules of Professional Conduct.

reopen this case, reconsider the four separate motions for summary judgment, reexamine the voluminous record, conduct further research and write another opinion regarding claims which we find, even with consideration of the statements, specious at best. Before relief can be given, courts routinely require the moving party to demonstrate that it has a meritorious claim or defense. *See United States v. $ 55,518.05 in U.S. Currency*, 728 F.2d 192, 195-97 (3d Cir. 1984); *N.A.A.C.P. v. Township of West Orange*, 786 F. Supp. 408 (D.N.J. 1992); 12 Moore's Federal Practice ¶ 60.24[1]. The moving party must convince the court "that vacating the judgment will not be an empty exercise." *Local 59 v. Superline Transp. Co.*, 953 F.2d 17, 20 (1st Cir. 1992). Plaintiff here has failed to convince us that vacating the judgment will be anything but "an empty exercise."[2] We feel

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2. We note that even if we were to consider the statements of Gotwalls and Boyer, the two statements for which certifications have been given, we would still conclude that plaintiff's evidence cannot support his claims under 42 U.S.C. § 1983, the New Jersey Constitution, the New Jersey Conscientious Employees Protection Act or state tort law. Gotwalls stated that the vice president of the firefighter union, and a defendant in this action, Joe Rush, told him that Mayor Whelan told Rush that "Kim would never be promoted as long as he was mayor." This statement is inadmissible hearsay and cannot be considered. Boyer's statement is equally unhelpful; it also contains some hearsay and is extremely ambiguous. At one point Boyer stated that the Mayor told him "you firemen always want something and then you go and support that 'asshole' Firillo [sic] for mayor against me and then you think I am going to give you an appointment" and "I will never appoint that asshole as long as I am mayor in the City of Atlantic City." The first part of the Mayor's comments reflect the Mayor's anger at the firemen for supporting Fioriglio, his anger at Boyer, and his intention not to

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it is wiser not to waste judicial resources and further hamper the orderly administration of justice. Accordingly, we will deny plaintiff's motion for relief from judgment under Rule 60(b).

III. CONCLUSION

For the foregoing reasons, we find that the failure of the plaintiff's attorney to correct the deficient unsworn statements prior to our decision in this matter does not constitute mistake, inadvertence or excusable neglect under Rule 60(b). Therefore, we will deny plaintiff's motion for relief from judgment. Accordingly, plaintiff's complaint remains dismissed, in its entirety, with prejudice.

Date: April 8, 1998 s/ Joseph E. Irenas
JOSEPH E. IRENAS, U.S.D.J.

(Cont'd)
appoint Boyer. The second part reflects the Mayor's dislike for Fioriglio and his intention not to appoint him either. Later in his statement, Boyer related hearsay where other firemen stated that the Mayor said he hated Fioriglio and the firefighters because they backed Fioriglio. Finally, Boyer concluded his statement by adding that, during the same conversation where the Mayor told him "I will never appoint that asshole," the Mayor told him "listen, I have nothing against him, I have always liked Kim, I worked with him on the beach." We find this testimony to be very confusing and ambiguous. Furthermore, even if the Mayor really did hate Fioriglio, under New Jersey's "Rule of Three," N.J.A.C. § 4A:4-4.8(a)(3), the mayor has the authority to appoint whichever candidate of the top three eligible candidates he chooses. Thus, even if we were to consider the statements which plaintiff is seeking to introduce through Rule 60(b), we would still grant summary judgment to the defendants and dismiss plaintiff's complaint with prejudice.